

**231 IN THE HIGH COURT OF PUNJAB AND HARYANA
AT CHANDIGARH**

CRR-2157-2019 (O&M)

Date of Decision: September 13, 2022

Harjit Kaur

...Petitioner

Versus

Satinder Sharma alias Indu Sharma and another

...Respondents

CORAM: HON'BLE MR. JUSTICE AMAN CHAUDHARY

Present:- Mr. Ajit Pal Singh Guliani, Advocate for the petitioner.

AMAN CHAUDHARY, J.(Oral)

Challenge in the present revision petition is to the order dated 01.08.2019, passed by Addl. Chief Judicial Magistrate, Mohali, vide which the application filed by the complainant-petitioner for summoning of witnesses has been dismissed.

The office report shows in the present case that though the respondents were served, however, no one has put in appearance on their behalf.

For the proper appreciation of the present matter, a few facts mentioned in the present petition require to be noticed namely:- complainant after the death of her husband had been cheated by her employees Ms. Satinder Sharma @ Indu Sharma w/o Sunil Sharma and Sunil Sharma against whom she filed complaint under Section 156(3) Cr.P.C. for registration of FIR under Sections 420, 465, 467, 468, 471, 120-B of the IPC through Shri S.K. Karwal, Advocate in the Court of learned Chief Judicial Magistrate, Mohali, in the year 2016 wherein after leading preliminary evidence summoning order was passed to summon the aforesaid accused:- During pre-charge evidence the counsel kept on delaying the case on the pretext of getting the same compromise which

was not acceptable to the complainant-petitioner. Being dissatisfied with the same, she changed her counsel who moved an application for conducting further examination-in-chief of the complainant in pre-charge evidence which was ultimately allowed by the trial Court vide order dated 24.01.2019, which was recorded on 26.02.2019 and the case was adjourned for her cross-examination; an application by the previous counsel of the complainant-petitioner was filed before the trial Court on 05.06.2018 for summoning the witnesses which was allowed by the Court on the same date thereby ordering the diet money of Rs.1,400/- to be deposited, which the petitioner paid to her earlier counsel for the same to be deposited; the new counsel assuming that the diet money for summoning the witnesses is lying deposited approached the criminal Ahlmad of the Court to get the summons issued as allowed by the Court on 05.06.2018 but was informed the same could not be issued for want of deposit of diet money; thereafter, another application dated 30.07.2019 (Annexure P-3) for summoning the same five witnesses which was allowed by the trial Court vide order dated 05.06.2018, was filed by the new counsel but the same dismissed by the trial Court vide order dated 01.08.2019 on the solitary ground that the witnesses which were mentioned in the said application do not match with the list of witnesses attached in the file, except one witness for whom also the record does not match. The said order reads thus:

“File taken up in view of the application filed on behalf of complainant for summoning the witnesses. Perusal of the list of witnesses attached in the file shows that the witnesses which are mentioned in the application filed today do not match except one witness, qua whom also the record does not match. Therefore, application for summoning the

witnesses as filed today is not liable to be allowed and is accordingly declined. The same be placed on record. File be put up on the date fixed i.e. 06.08.2019.”

Learned counsel for the petitioner contends that since there was no interim order passed by this Court, the learned trial Court proceeded with the complaint and vide order dated 04.09.2019, closed the pre-charge evidence. Accordingly, the petitioner filed CRM No.31098-2019 praying for stay of the proceedings before the trial Court on the ground that in case the proceedings are not stayed before the learned trial Court, the petitioner, who is complainant in the case shall suffer an irreparable loss and in all likelihood her complaint will be dismissed because of there being no evidence. This Court vide order dated 04.10.2019, directed the trial Court to adjourn the case beyond the date fixed in the instant case.

Learned counsel submits that in the application filed by the previous counsel which was allowed vide order dated 05.06.2018 as also the present application filed by the new counsel the names and details of the witnesses were of the same very five witnesses. He further submits that it was only on account of the fact that the diet money was not deposited by the previous counsel, that the necessity to file a fresh application arose, which was filed by the subsequent counsel, who is presently also representing the petitioner-complainant before the trial Court. He, therefore, submits that the trial Court had committed error in dismissing the application.

Learned counsel for the petitioner further submits that the petitioner is seeking only one effective opportunity for summoning the

witnesses, else grave prejudice shall be caused to the complainant, who is a widow and the allegations in the complaint are that she has been defrauded of lacs of money by the employees of the company, which was being run by her husband, who had unfortunately passed away.

Heard.

It is revealed from a perusal of the order whereby notice of motion was issued by this Court that the solitary contention raised was of the lapse on the part of his counsel in not taking steps for examination of other witnesses, on which account the complainant should not suffer and one opportunity to summon witnesses subject to reasonable costs is what was prayed for as their testimonies will be material for the adjudication of the case.

It is apposite to notice that the complaint in question was filed by the present petitioner on 27.01.2016, ever since then the matter is pending. It is the assertion of the petitioner that in case the witnesses are not permitted to be examined, in all likelihood the complaint would be dismissed. It is only on account of the fault of the previous counsel that the matter has not proceeded. The Hon'ble Supreme Court of India in case of ***Rafiq and another vs Munshilal and another***” reported as AIR 1981 SC 140 had held that for the fault of the counsel the client cannot be made to suffer. The relevant para of the said judgment reads thus:

“What is the fault of the party who having done everything in his power expected of him, would suffer because of his advocate The problem that agitates us is whether it is proper that a party should suffer for the inaction, deliberate omission, or misdemeanour of his agent We cannot be a party to an innocent party suffering injustice merely because of his chosen advocate defaulted.”

The aforesaid view has been consistently followed by Hon'ble the Supreme Court of India as is apparent from the judgment in the case of ***“Shiv Kumar Pandey vs State of U.P. Thru. Secy. Agriculture & Ors.”*** (in Special Appeal Defective No.417 of 2021, decided on 26.10.2021).

The Hon'ble Supreme Court of India in the case of ***“Natasha Singh vs CBI (State)”*** (in Criminal Appeal No.709 of 2013, decided on 08.05.2013) and in the case of ***“Swapan Kumar Chatterjee vs Central Bureau of Investigation”*** reported as (2019) 14 Supreme Court Cases 328, though with regard to the power of the Court under Section 311 Cr.P.C., with regard to the summoning and recall of witnesses has held that the power for the same may be used at any stage or any inquiry, trial or other proceedings to determine the truth and to render just decision as also in order to meet the ends of justice, such discretion of the Court is not limited. The determining factor should therefore be whether summoning/recalling of the witnesses is in fact essential to the just decision of the case.

If summoning, recalling witnesses can be permitted at any stage, as held by the Hon'ble Supreme Court of India, in that case, the dismissal of an application filed to summon the same very witnesses as mentioned in the previous application and allowed by the trial Court vide order dated 05.06.2018, which due to non-deposit of diet money could not be summoned, at pre-charge stage to substantiate and corroborate the allegations stated in the complaint, is a grave error committed by the learned trial Court.

The trial Court was required to have perused the previous

order, at the least and considered the facts and circumstances under which the application that was dismissed by it had been filed, especially that the case itself was pending from 2016 at almost the same stage. The complainant-petitioner could not have been allowed to suffer on account of the default of the previous counsel as has been held by Hon'ble the Supreme Court in case of **Rafiq (supra)** and other subsequent decisions and when the Hon'ble Supreme Court of India has held that witnesses can even be summoned or recalled at any stage, then in a case like such where the summons could not be issued due to a technical issue on account of non-deposit of the diet money, that too due to the fault of the previous counsel, as also when the names and details mentioned of the five witnesses in the application dated 30.07.2018, were the same as mentioned in the previous application which as a matter of fact had even been allowed by the trial Court itself vide order dated 05.06.2018, the trial Court was not justified in dismissing the application.

In the peculiarity of the facts and circumstances of the case as having been noticed above as also in view of the judgment in case of **Rafiq (supra)**, the present petition is allowed. The impugned order dated 01.08.2019 is set aside. The petitioner is granted one effective opportunity to summon and examine the witnesses to substantiate the complaint filed by her.

It is expected that the trial Court will make an endeavour to decide the matter at the earliest possible.

September 13, 2022

sarita

(AMAN CHAUDHARY)
JUDGE

Whether reasoned/speaking: Yes/No
Whether reportable: Yes/No